against the officers.[12] Thus a contract by the State for the sale of land vests such a property right in the vendee that a breach of the contract would involve the taking of property.[13]

Where title to property is acquired by an officer under color of state authority, the title vests in the State only if the act is within the constitutional powers of a State; but if it is not, the title acquired by the unlawful act can vest only in the wrong-doer as an individual, and a suit for its recovery is not against the State.[14]

The distinction between private and representative acts, however, is most difficult where an officer instigates judicial proceedings. If the duty of bringing suit pertains to his office,[15] it seems that he cannot be enjoined although its performance would break a contract of the State;[16] for the limitation upon a State's power to break its contracts is directed only against legislative action, and the officer, therefore, in so doing within his authority, is not acting in his private capacity, and is, therefore, exempt from suit. If, on the other hand, the right to bring suit is conferred by an unconstitutional statute, an attempt to exercise it is only the act of the individual.[17] Thus in the recent case of *Louisville & Nashville R. R.* v. *Bosworth et al.* (D. C. E. D. Ky. 1913) 209 Fed. 380, in accord with these principles, the court not only enjoined a state board from acting in violation of the Fourteenth Amendment, although the statute under which it purported to act was constitutional, but also restrained the Attorney General from bringing suit, for his right of action could only be derived from the unconstitutional acts of the board.

UNENFORCIBLE RESTRICTIVE COVENANTS IN NEW YORK.—While it is settled that under certain circumstances a change in the character of the neighborhood will, in the discretion of the court, justify a refusal to decree the specific performance of a restrictive covenant,[1] it

[12]Poindexter *v.* Greenhow, *supra;* Allen *v.* Baltimore etc. R. R. (1884) 114 U. S. 311.

[13]Pennoyer *v.* McConnaughy (1891) 140 U. S. 1; Davis *v.* Gray, *supra; cf.* Louisiana *v.* Jumel, *supra.*

[14]Osborn *v.* U. S. Bank, *supra;* Louisiana *v.* Jumel, *supra;* Hopkins *v.* Clemson College (1910) 221 U. S. 636; Tindal *v.* Wesley (1897) 167 U. S. 204; see Cunningham *v.* Macon etc. R. R. (1883) 109 U. S. 446; *cf.* Stanley *v.* Schwalby (1896) 162 U. S. 255. An injunction for the use of an infringing device by officers of the United States has been refused. Belknap *v.* Schild (1895) 161 U. S. 10. This seems justifiable only upon the ground that the continued use of a patent without the consent of the owner is not a taking of property.

[15]See Gunter *v.* Atlantic Coast Line (1906) 200 U. S. 273.

[16]*In re* Ayers, *supra.*

[17]*Ex parte* Young (1908) 209 U. S. 123. Here the court distinguished Fitts *v.* McGhee (1898) 172 U. S. 516, on the ground that the officer in the McGhee case was not a proper party defendant; this seems to nullify the reasoning of that case to the effect that a threatened suit under an unconstitutional statute cannot be enjoined unless this was a duty specially charged by the statute.

[1]Jackson *v.* Stevenson (1892) 156 Mass. 496; Page *v.* Murray (1890) 46 N. J. Eq. 325; note to Brown *v.* Huber (Ohio 1910) 28 L. R. A. [N. S.] 706. The English courts do not accept this doctrine. Pulleyne *v.* France (1913) 57 S. J. 173.

is difficult to extract from the decisions the principles which control the exercise of this discretion. This unsatisfactory state of the law would not seem attributable to any difficulty in determining the question of fact as to whether the defendant's or the plaintiff's premises remain suitable for those purposes to which they have been devoted by the covenant, but results from the unsettled views as to the true basis for refusing the equitable relief.

The courts, however, apparently regard the defendant as being in a position to invoke the doctrine of hardship. In *Trustees of Columbia College* v. *Thacher*,[2] it would seem that the facts were such as to enable the defendant to successfully resist performance on this ground.[3] There, the specific performance of the covenant, devoting the restricted district to residential uses, would have been ineffectual to accomplish this object, because of a subsequent event which was not reasonably foreseeable by the parties at the time of contracting.[4] However, the court recognized that the defendant should be allowed to set up the defense of hardship only when the event which rendered the performance of the covenant onerous, was not reasonably within the contemplation of the parties.[5] This view seems clearly sound, for when the event, making the covenant burdensome to the defendant, was reasonably within the contemplation of the parties, it is difficult to see how the defendant would suffer hardship if compelled to perform the agreement into which he knowingly entered. And since in every case where the covenant restricts the premises to residential uses the encroachment of business in the neighborhood would seem to be a reasonably foreseeable event, the defense of hardship should never prevail merely because the neighborhood has become a business district. Nevertheless, the later cases take the view, recently reaffirmed by the Court of Appeals in *Batchelor* v. *Hinkle* (1914) 50 N. Y. L. J., March 9, 1914,[6] that specific performance should not be granted when, in the opinion of the court, the property intended to be benefitted, is, because of the change in the neighborhood, no longer suitable for the uses sought to be promoted by the covenant.[7] And the theory of these cases seems to be that inasmuch as the purpose of the covenant was merely to maintain the residential character of the entire neighborhood, its specific enforcement should be denied when that object can

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[2](1882) 87 N. Y. 311.

[3]9 Columbia Law Rev. 68.

[4]"It is true, the covenant is without exception or limitation, but I think this contingency which has happened was not within the contemplation of the parties."

[5]"The general current of business affairs has reached and covered the entire premises fronting on Sixth Avenue, both above and below the lot in question. If this was all, however, plaintiffs would be justified in their claim, for it is apparent from the agreement that such an encroachment was anticipated." 6 Bench & Bar [N. S.] 56, 96, 104. See to same effect Pagenstecher *v.* Carlson (1911) 146 App. Div. 738; *cf.* Goodhue *v.* Cameron (1911) 142 App. Div. 470.

[6]*Cf.* Zipp *v.* Barker (1899) 40 App. Div. 1, affirmed (1901) 166 N. Y. 621.

[7]Amerman *v.* Deane (1892) 132 N. Y. 355; McClure *v.* Leaycraft (1905) 183 N. Y. 36. If the restriction is such that the property will be benefitted by its enforcement, despite the change in the neighborhood, the court will enforce it. See Zipp *v.* Barker, *supra.*

no longer be attained. But this assumption as to the covenantee's object in securing the covenant would seem unwarranted by the facts, for in every case certainly a part of the object is to prevent the covenantor from using his property in other than the restricted manner; and furthermore, if the parties contemplated the changes upon unrestricted property of the neighborhood, it would seem that the whole of the object of the covenant was to restrain the action of the covenantor. The position as now taken by the Court of Appeals must find its true basis in considerations of policy, such as a desire to discourage the use of property for residential purposes in a business locality, or to render the restricted district available for the advancing needs of business.

But it would seem that no matter what view the Court finally adopts in determining when a change in the character of the neighborhood would justify a refusal to enjoin a breach of the restrictive covenant, a covenantor should never, because of such a change, be allowed to have the restrictive agreement delivered up and canceled, for it is quite possible that the neighborhood may resume its original character, and the covenant in that event again become valuable to the covenantee.[8]

RECORDING AS A VOIDABLE PREFERENCE.[1]—The Bankruptcy Law of 1867 provided that a conveyance, to be voidable as a preference, must have been made within four months before bankruptcy. Since the effect of recording acts is generally to make unrecorded instruments not void but at most inoperative as against all third parties,[2] it seems clear that a conveyance within their scope is "made" when executed; and that if executed more than four months, but recorded within four months before bankruptcy, it will be unassailable. This is the view taken by the majority of the cases,[3] and apparently the rule was so settled by a decision of the Supreme Court.[4]

The Act of 1898 defined a preference as suffering a judgment or making a transfer while insolvent, so as to enable any creditor to obtain more than his *pro rata* share;[5] and provided that if such prefer-

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[8]The case of St. Stephen's Ch. *v.* Ch. of Transfiguration (1911) 201 N. Y. 1, 6, is clearly distinguishable upon the ground that there the covenantee retained no land which could be beneficially affected by the enforcement of the covenant. *Cf.* Coudert *v.* Sayre (1890) 46 N. J. Eq. 386.

[1]The question of fraudulent conveyance is not treated here. Failure to record is, however, a badge of fraud. Clayton *v.* Exchange Bank (C. C. A. 5th Cir. 1903) 121 Fed. 630, *certiorari* denied (1903) 191 U. S. 567.

[2]As to the effect of the various recording acts, see 13 Columbia Law Rev. 539.

[3]*Ex parte* Dalby (D. C. D. Mass. 1870) Fed. Cas. No. 3540; Folsom *v.* Clemence (1873) 111 Mass. 273; *contra,* Bostwick *v.* Foster (C. C. D. Vt. 1878) Fed. Cas. No. 1682.

[4]Sawyer *v.* Turpin (1875) 91 U. S. 114; see Matthews *v.* Westphal (C. C. D. Ia. 1880) 48 Fed. 664; National Bank *v.* Conway (C. C. E. D. Va. 1876) Fed. Cas. No. 10037.

[5]Bankr. Act. (1898) § 60 (a).